LIONS OR JACKALS: THE FUNCTION OF A CODE OF JUDICIAL ETHICS

JUDGE IRVING R. KAUFMAN*

To a significant degree, our concept of a code of judicial ethics is shaped by our notion of the role of those it regulates. In the aftermath of the famous early case of *Rex v. Hampden*,[1] the historian C. V. Wedgewood concluded that the judges of that period, far from being "lions under the throne . . . grew to look like sheep or even jackals."[2] Her view of judicial subservience to royal authority under the Stuarts is hardly undisputed,[3] but the essential substance of that controversy—the nature and extent of judicial independence—underlies much of the present confusion over what a judicial code of ethics ought to be.

Before proceeding any further into my subject, I should add one brief *caveat*: although I am a member of the American Bar Association Special Committee on Standards of Judicial Conduct, which is entrusted with the task of redrafting the fifty-year-old Canons of Judicial Ethics,[4] the views I express here are wholly my own and should not be taken as those of the Committee. And although the Committee released an Interim Report with some "specific conclusions," accompanied by a Preliminary Statement early this summer,[5] and held open hearings on the proposals at the annual ABA meeting in August, its deliberations are "[s]ubject to reexamination in the light of suggestions received after publication of [the] report . . . ."[6] I should not, therefore, like to be understood as fixing in advance my response, or that of the Committee, to specific issues and problems. Rather, what I hope to offer here are some preliminary and highly provisional observations intended to stimulate the thoughts of others and clearly subject to reconsideration, reevaluation, and modification.

Now that the initial furor over judicial conduct raised by the nomination, rejection, and subsequent resignation of former Associate Justice Abe Fortas has turned

* Circuit Judge, United States Court of Appeals for the Second Circuit; Member, American Bar Association Special Committee on Standards of Judicial Conduct; President, Institute of Judicial Administration.

[1] Rex v. Hampden, 3 How. St. Tr. 825 (Ex. 1637).

[2] C.V. WEDGEWOOD, THE KING'S PEACE 137 (1955).

[3] "[A]lthough the roar was somewhat muffled, they remained lions under the throne." Noble, *Lions or Jackals? The Independence of the Judges in* Rex v. Hampden, 14 STAN. L. REV. 711, 761 (1962).

[4] AMERICAN BAR ASSOCIATION CANONS OF JUDICIAL ETHICS [hereinafter cited as ABA CANONS]. The Canons were adopted by the ABA in 1924, and with minor modifications in 1933, 1937, 1950, and 1952, have been little changed in the interim. The Special Committee was appointed by ABA President Bernard Segal in August 1969.

[5] ABA SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT, PRELIMINARY STATEMENT and INTERIM REPORT (June 1970) [hereinafter cited as PRELIMINARY STATEMENT and INTERIM REPORT].

[6] INTERIM REPORT 1. *See also* PRELIMINARY STATEMENT 3.

to substantive proposals, I believe it is time that we directed our attention more critically to the question of what precisely we hope to achieve in revising standards of judicial conduct. And to my mind, the answer to that question is closely allied, to put it somewhat bluntly, to whether we consider our judiciary, on the whole, "lions" or "jackals."

The present Canons of Judicial Ethics clearly side with the lions. By that I mean that the Canons view the judiciary essentially as a body of self-regulating individuals; the Canons exhort judges to seek "independence"[7] and not to concern themselves with "private political or partisan interests."[8] That, of course, has always been our historical ideal[9] and as one Justice of the Supreme Court said recently, "an independent judiciary has always been one of this Nation's outstanding characteristics."[10]

One focus of our tradition of judicial independence has been the manner in which we choose judges. Rather than selecting them through written or oral examinations and advancement under a rigid civil service system, we have generally followed the practice of choosing members of the bar, hopefully of some stature, and elevating them to the bench.[11] Men selected in such a manner most often have distinguished themselves professionally. In some cases this means that they have enjoyed financial success, and in others it indicates that they have made fruitful contributions to the common good in legal or other fields. Once on the bench, we are accustomed to expect from our judges a breadth of vision that comports with their independent status; and I think it not merely happenstance that it has been men with diverse interests and backgrounds that have, as a general proposition, met that test. Edmund Burke is supposed to have said, "Law sharpens the mind by narrowing it." It seems to me that the words were meant less in praise of the profession than in warning to it. Judges run the risk of becoming oracles who speak of lectures delivered ten, twenty, or thirty years ago, adequate for their time but not for ours. To the extent that the judicial profession becomes the daily routine of deciding cases on the most secure precedents and the narrowest ground available, the judicial mind atrophies, and its perspective shrinks. What impresses us about the great jurists is not their tenacious grasp of a fine point, honed almost to in-

[7] ABA CANON No. 14: "*Independence.* A judge should not be swayed by partisan demands, public clamor, or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism."

[8] ABA CANON No. 34: "*A Summary of Judicial Obligation.* . . . [A judge] should be . . . impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences . . . ."

[9] *See* U.S. CONST. art. III, § 1, granting judicial tenure during "good behavior"; Sobeloff, *Striving for Impartiality in the Federal Courts*, 24 FED. B.J. 286, 288-89 (1964). *See generally*, J. DAWSON, ORACLES OF THE LAW ch. 2 (1968).

[10] Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting).

[11] Contrast the German practice. *See* W. WEYRAUCH, PERSONALITY OF LAWYERS: A COMPARATIVE STUDY OF SUBJECTIVE FACTORS IN LAW, BASED ON INTERVIEWS WITH GERMAN LAWYERS (1964).

visibility; it is the moment when we are suddenly made aware of the sweep and direction of the law, and its place in the minds of men.

Hence I think that much can be said in favor of the position that we ought to encourage, rather than discourage, judicial activities that exceed the four corners of cases presented for disposition. There can be few qualities more conducive to continued judicial independence than the breadth of vision acquired in differing endeavors to advance law and justice. But having said that, I must draw back from the most extreme implications of such a stand. We begin to qualify before we speak. There are, as I see it, two general objectives that limit, and to some extent complement, the aim of an independent judiciary. The first is obvious: a judge's primary concern, and hence his primary obligation, is to devote sufficient time to his judicial duties so that justice is done to the litigants before him. Other activities, however praiseworthy, which detract from a judge's ability to perform his judical tasks adequately, must be relegated to a secondary position. All that follows must be considered subject to this qualification.[12]

Few dispute that a judge must pay primary attention to judicial tasks; nor would many argue with the proposition that a judge's extra-judicial or quasi-judicial activities[13] must be structured to avoid even the appearance of impropriety. In a sense, limiting outside activities so that they will not give an appearance of partiality or prejudgment is really but another facet of the goal of an independent judiciary. Dependency in all its forms—from private as well as public interests—must be avoided if the judiciary is to receive the respect and support it requires to function effectively. Possessed of neither the purse nor the sword, it depends primarily on the willingness of members of society to follow its mandates.[14]

The problem is to find a proper method, and even more, a proper attitude, with which to resolve these sometimes conflicting goals into a code of ethics. One view, vigorously championed by Dean Acheson, would strictly prohibit judges from engaging in all but the most narrowly defined "legal" activities, and would enact those prohibitions into law.[15] Others, considering the task of drafting comprehensive and useful prohibitions both extraordinarily difficult and highly unproductive, have concluded that "in seeking to achieve a rational course of ethical conduct, the answer is to be found only within the conscience of the judge."[16]

[12] *See* INTERIM REPORT ¶ 1: "*Judicial Duties.* A judge's primary duty is to perform competently all the duties of office imposed on him by constitution, statute, court rule, and the common law. All his other activities are subordinate to his obligation to carry out his judicial duties." *See also* ABA CANON No. 6: "*Industry.* A judge should exhibit an industry and application commensurate with the duties imposed upon him."

[13] The Interim Report follows a tripartite division of spheres of judicial activity: *judicial duties* are those required of a judge to perform the functions of his office; *quasi-judicial activities* assist in improving the law or judicial administration; and *extra-judicial activities* include civic, charitable, and other concerns. *See* note 12 *supra*; INTERIM REPORT 1-2. I shall follow this terminology.

[14] *See* Sobeloff, *supra* note 9, at 286.

[15] *See* Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919 (1969).

[16] *See* Hastings, *Judicial Ethics as It Relates to Participation in Money-Making Activities*, UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE ON JUDICIAL ETHICS 1 (1964).

My own views incline more towards the latter, but with significant modifications that I suppose put me somewhere between both extremes. Some years ago, Chief Justice Warren spoke at the Jewish Theological Seminary of America, and suggested that men in all walks of life could benefit from the services of a new profession, "counselors in ethics."[17] While it is unlikely that we will soon have a counselor appointed to assist each judge in resolving his ethical questions, still the concept is a provocative one, for it suggests the usefulness of an outside voice in guiding a judge's implementation of his own ethical precepts.[18] And that, I think, in a nutshell, is what a code of ethics should do. It must aim at prompting a dialogue between a judge's own ethical sense and generally recognized communal moral standards.

In most areas of judicial ethics, unless we accept the "jackal" view of the judiciary and opt for wholesale prohibitions, we will be unable to draft rules sufficiently precise to capture the variety of human endeavor, and to sift each instance of participation for potential ethical problems. We will simply have to accept broad statements to the effect that a judge's first obligation is to do justice to the litigant before him, and that he should not divert "substantial" amounts of time to other activities; we cannot expect to spell out how many hours a day he must spend in one activity or another.

The concept of a code of ethics as an invitation to a dialogue between the conscience of a dedicated judge and communal standards is not, however, necessarily an exclusive one. As in the course of interpretation of the antitrust laws, where the "rule of reason" has given way to *per se* prohibitions in instances in which the harm is great and the benefit small,[19] we may, without emulating the all-inclusive character of a penal code, reasonably prohibit specific conduct. The aim is to create prophylactic rules in instances in which it is clear that the danger to the judiciary's reputation and performance will outweigh any useful by-products.[20] The Interim Report, for example, not only continues the preexisting prohibitions against the practice of law,[21] but extends the *per se* prohibition to arbitration,[22] nonfamily trusteeships,[23] and business enterprises.[24] In each instance, the direction has been from general state-

[17] Remarks of Chief Justice Warren, Louis Marshall Award Dinner, Nov. 11, 1962 (mimeographed copy). For news reports, *see* N.Y. Times, Nov. 12, 1962, at 1, col. 3.

[18] *Cf.* Frankel, *Judicial Ethics and Discipline for the 1970s*, 54 JUDICATURE 18, 20 (1970), suggesting the usefulness of outside review of a judge's decisions on ethics; Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 675 (1959): "[T]here is always a shortage of wise men."

[19] *See* P. AREEDA, ANTITRUST ANALYSIS ¶¶ 303, 348 (1967).

[20] In the similar context of congressional ethics, a recent study concluded that "Properly conceived, conflict-of-interest regulation does not condemn bad actions so much as it erects a system designed to protect a decision-making process. It is preventive and prophylactic. Its aim is not detection and punishment of evil, but providing safeguards which lessen the risk of undesirable action." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS, CONGRESS AND THE PUBLIC TRUST 39 (1970).

[21] ABA CANON No. 31; INTERIM REPORT ¶ 9.

[22] INTERIM REPORT ¶ 9.

[23] *Compare* INTERIM REPORT ¶ 4 *with* ABA CANON No. 27.

[24] *Compare* INTERIM REPORT ¶ 6 *with* ABA CANON No. 25. The Judicial Conference of the United

ments to highly specific conclusions.

I should emphasize that formulation of *per se* rules is not only for the benefit of litigants; judges too yearn for the safe harbor of a certain rule. What we must realize, however, is that increasing specificity and certainty do not necessarily connote progress; applied in a broadside and indiscriminate manner, specific rules and prohibitions could threaten the capacity of the judiciary to foster and maintain diverse activities and interests. An area in which this stricture seems particularly applicable is that involving demands made on a judge's time by useful and important activities intended to promote judicial administration. One could take the position that since judicial tasks might be slighted, quasi-judicial and extra-judicial activities should be abandoned altogether, especially since drafting a specific rule permitting some quasi-judicial activities seems virtually impossible. Yet this would, I submit, be the worst of all possible worlds, for it would place a premium on judicial myopia in an age that incessantly demands more independence and more understanding to solve the increasingly complex and sensitive issues our society leaves to be settled by litigation. In addition, I fear such an approach would deprive the judicial reform movement of many of its ablest supporters.

One can see somewhat similar problems in the financial area. If we are to continue to select judges from among leading members of the bar, some of them are bound to have acquired substantial financial interests. While it is reasonable and compelling that they be asked to confine their investments to enterprises not often likely to require disqualification,[25] and to disqualify themselves when they do have an "interest" in a controversy,[26] complete divestiture, or complete disclosure of all assets (as opposed to earnings[27]), would cause some highly qualified individuals to pause before accepting judicial appointment.[28] It is a simple, practical reflection of our society that men possessed of stature, ability, and strong character will not in-

States, at its September 17-18, 1963, meeting, adopted the following resolution: "RESOLVED: No Justice or judge appointed under the authority of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit."

[25] *See* ABA CANON No. 26; INTERIM REPORT ¶ 6(b).

[26] *See, e.g.*, 28 U.S.C. § 455 (1964); N.Y. JUDICIARY LAW art. 2, § 14 (McKinney 1968); ABA CANON No. 29; INTERIM REPORT ¶ 8.

[27] The Interim Report requires, for the first time, that a judge publicly disclose all compensation received from outside activities. INTERIM REPORT ¶ 7. On June 10, 1969, Chief Justice Earl Warren (as he then was) announced that the Judicial Conference of the United States had limited outside compensation to that approved by the judicial council of each circuit and made a matter of public record. In addition, each judge was to file a statement of his assets and income. The approval requirement was suspended at the Oct. 31, 1969, session of the Judicial Conference, pending completion of the work of the ABA Committee on Standards of Judicial Conduct. However, an Interim Advisory Committee, appointed in December 1969 by Chief Justice Warren Burger, has continued to give advisory opinions on extra-judicial activities. At the March 16-17, 1970, session, the Conference approved a limited public disclosure of compensation and organizational positions held. A decision on further reporting of assets was again deferred pending revision of the Canons of Judicial Ethics by the ABA Committee.

[28] The California Supreme Court, in City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 47 (1970) (en banc), held that a California statute requiring public office holders (including judges) to file annual statements of investments, was an overbroad invasion of the right of privacy, and therefore unconstitutional.

frequently prosper financially. It will not do to discourage such men from aspiring to the bench. And given what I believe is the universal desire of judges I have known to avoid even the suspicion of a conflict of interest, I believe the benefit to be gained by disclosure or divestiture small in relation to the likely harm caused the judiciary by implementing either course. We would be placing the judiciary in the dangerous position of perhaps saving its honor at the expense of its independence. And the benefits, I should think, would be minimal. Whatever corrupt judges may exist would file misleading reports. We would probably create a yearly flurry in the popular press over particular judges, permitting the bar and the public the unusual pleasure of seeing courthouse gossip spread across the pages of the daily paper.

The better course, to my mind, is to continue to choose good men, provide them with a body of ethical standards to which they may repair and then, in all but the obvious cases where *per se* treatment is justified, trust to the character of those we have selected. I find myself in substantial agreement with Judge Edwards that the members of the judiciary with whom I have come into contact in more than twenty years on the bench are, on the whole, a sober and honest group, far removed from the "jackals" at whom procrustean limitations are usually directed.[29] I would suggest that it is more in keeping with the genius of our judicial tradition to continue to treat our judges as "lions," and to expect them to submit more readily to ethical dialogues. There are times when we need men who can feel and understand what goes on in the world about them; we shall not find such men in a gray "bureaucracy" divorced from all outside activities and interests.[30] And there are times, I might add, when we need men who are not afraid to roar should the occasion demand it.

[29] Edwards, *Commentary on Judicial Ethics*, 38 FORDHAM L. REV. 259, 261 (1969). *See also* Rifkind, *A Judge's Nonjudicial Behavior*, 38 N.Y.S.B.J. 22 (1965); W. WEYRAUCH, PERSONALITY OF LAWYERS: A COMPARATIVE STUDY OF SUBJECTIVE FACTORS IN LAW, BASED ON INTERVIEWS WITH GERMAN LAWYERS (1964).

[30] Edwards, *supra* note 29, at 275.